Diplomat Envelope Corporation *and* Printing Specialties and Paper Products Union No. 447, International Printing and Graphic Communications Union, AFL–CIO. Case 29–CA–7983

August 18, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On March 4, 1982, Administrative Law Judge Steven B. Fish issued the attached Decision in this proceeding. Thereafter, both Respondent and the Charging Party filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Diplomat Envelope Corporation, Long Island City, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT fail or refuse to execute the collective-bargaining agreement agreed upon between us and the Union.

WE WILL NOT unilaterally cease making payments on behalf of our unit employees in the Union's pension, welfare, or annuity funds; fail to grant wage increases due under the collective-bargaining agreement to our employees; or fail or refuse to arbitrate the discharge of our employee Thomas Dugan.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request by the Union, forthwith execute the contract upon which agreement was reached between us and the Union.

WE WILL give retroactive effect to the terms and conditions of employment of said contract, and make whole our employees for any losses they may have suffered by reason of our failure to sign the agreement, with interest.

WE WILL pay all contributions to the Union's pension, welfare, and annuity funds as provided for in the collective-bargaining agreement, which have not been paid and which would have been paid absent our unlawful discontinuance of such payments.

WE WILL arbitrate the discharge of employee Thomas Dugan.

DIPLOMAT ENVELOPE CORPORATION

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge: Pursuant to charges filed on May 5, 1980, by Printing Specialties

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Respondent's request for oral argument is denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

In light of our adoption of the Administrative Law Judge's finding that the parties had entered into an agreement as of August 6, 1981, we find it unnecessary to rely on the Administrative Law Judge's discussion of *Nolde Brothers* v. *Local 358, Bakery & Confectionery Workers Union, AFL–CIO*, 430 U.S. 243 (1977), and *American Sink Top & Cabinet Co., Inc.*, 242 NLRB 408 (1979).

Citing the Multiemployer Pension Plan Amendment Act of 1980, the Charging Party contends that the Administrative Law Judge erred with respect to the proposed make-whole remedy as to employee benefit contributions found to be due and owing by Respondent. Citing *Merryweather Optical Company*, 240 NLRB 1213, 1216, fn. 7 (1979), the Administrative Law Judge, at fn. 59, specifically provided that such matters, including the awarding of interest on employee benefit contributions, would be left "to further proceedings." We agree with the Administrative Law Judge that such matters are better resolved at the compliance stage of this proceeding.

We deny the Charging Party's request that Respondent be assessed litigation expenses as Respondent's defenses are not, in our opinion, patently frivolous. *Heck's Inc.*, 215 NLRB 765 (1974).

[3] Respondent contends that the transcript in this case contains several serious inadequacies, *inter alia*, the omission of a number of pages of testimony. We have carefully reviewed the transcript and find that the errors in it are not so serious as to prejudice any of the parties nor is there any indication that any testimony has been omitted from the transcript.

and Paper Products Union No. 447, International Printing and Graphic Communications Union, AFL-CIO, herein called the Union or the Charging Party, the Regional Director for Region 29 issued a complaint and notice of hearing on July 31, 1980. Said complaint alleges that Diplomat Envelope Corporation, herein called Respondent, violated Section 8(a)(1) and (5) of the Act, by refusing to sign a written agreement agreed to with the Union on or about August 3, 1979,[1] by unilaterally failing and refusing to make payments to various union funds, by failing to pay an agreed-upon wage increase, without notifying or affording the Union an opportunity to bargain about such actions, and by failing and refusing since on or about February 6, 1980, to arbitrate the discharge of Thomas Dugan, one of Respondent's employees.

A hearing was held before me on March 23, 24, and 25, 1981, in Brooklyn, New York, with respect to the allegations encompassed by said complaint. I have carefully considered the General Counsel's oral argument, as well as the briefs which have been received from Respondent and the Charging Party.

Upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, is engaged in the printing and manufacturing of envelopes and related paper products, with its principal office and place of business at 23-23 Borden Avenue, Long Island City, New York. Annually, Respondent purchases and causes to be transported and delivered to its place of business paper, paper products, and other goods and materials valued in excess of $50,000, delivered directly to its place of business from States of the United States other than the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that the Union is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

Respondent is a closely held corporation with Roy Arroll, its president, a member of the board of directors, and a one-third stockholder, being the chief operating officer of the Company. Roy Arroll has been president of Respondent since its inception in 1952.[2]

Respondent's other officers and directors are Mark Arroll, Roy's brother, who is also Respondent's attorney, Beatrice Krassner, sister of Roy and Mark, and Robert Krassner, Beatrice's husband, who shares the day-to-day operation of the business with Roy Arroll.[3]

For over 20 years the Union has been the collective-bargaining representative of Respondent's employees. Prior to 1970 Respondent was a member of the Paper Merchants Association, an Employer Association of 45 to 50 employers, and applied collective-bargaining agreements negotiated by the Association and the Union to its employees.

On March 16, 1970, Respondent by letter, withdrew from membership in the Association. Respondent, along with two other employers[4] who had been members of the Association and had also withdrawn, requested bargaining with the Union on a joint basis. The Union consented and negotiations were conducted in this fashion in 1970. Roy Arroll was present and participated in these negotiations along with representatives of the other firms, and each of the three companies signed separate contracts with the Union. Respondent's contract, dated November 26, 1970, was signed by Roy Arroll and by James Mitchell, president of the Union, and was effective from April 1, 1970, to March 31, 1973. The agreement provides for wage increases for various classifications of employees over a 3-year period, welfare benefits, a cost-of-living plan, a pension plan, and a clause entitled "Settlement of Disputes, Differences and Grievances." Said clause, article 13, reads as follows:

> All disputes, differences and grievances that arise shall be taken up in the first instance between the shop steward, if there be one, and by the Union representative and the Employer. An employee may present his own grievance personally, if he chooses to do so, but nothing contained herein shall be deemed to limit, in any way, the right of the Union to present to the Employer any complaint of violation of this contract. If no settlement is arrived at, then the dispute, difference or grievance shall be submitted for arbitration to an arbitrator appointed by the New York States Board of Mediation, whose decision shall be binding on all parties. A violation of this contract or of any previous contract shall survive the expiration of such contracts, and the fact that a subsequent contract is signed between the Union and the Employer shall not be deemed to be a bar to the Union's claim of violation at an earlier date under the provisions of the then existing contract.

Subsequent to the completion of the negotiations resulting in the execution of the above contract, Mitchell received a phone call from Roy Arroll. Arroll indicated to Mitchell that Respondent wished to go into the manufacturing end of the business.[5] Arroll requested a meeting to discuss terms and conditions of employment for such employees. A meeting was held, at which time Mitchell offered Respondent the total manufacturing division contract which the Union had with other employers in the industry. At that time the manufacturer's con-

[1] All dates hereinafter referred to unless otherwise indicated are in 1979.

[2] Roy Arroll majored in and has a B.A. and a master's degree in economics.

[3] Beatrice Krassner works part time for Respondent, performing bookkeeping functions.

[4] The other two companies were Atomic Envelope Co. and Melo Envelope Corp., herein called Atomic and Melo, respectively.

[5] Previously Respondent had been engaged solely in the printing aspect of the industry, employing only employees engaged in printing and warehousing functions.

tract was less expensive than Respondent's printing contract. Arroll rejected Mitchell's offer of the total manufacturers contract, stating that Respondent had enough with Association contracts, and that if there was going to be mistakes made, Respondent preferred to make them on its own.

Accordingly, an agreement was negotiated covering the manufacturing employees employed by Respondent, which was incorporated in an addendum to the prior agreement covering Respondent's printing employees. The addendum dated March 24, 1971, changed the recognition clause and included new classifications of employees performing manufacturing functions. Minimum wage schedules were agreed to for those employees, as well as raises of $6 per week effective on November 1, 1970, $2 per week effective on May 1, 1971, $10 per week effective on November 1, 1971, and $6 per week effective on November 1, 1972.[6] In all other respects the 1970 contract between the parties was applicable to Respondent's manufacturing employees.

In 1973, negotiations for a new agreement were conducted by Mitchell and Mark and Roy Arroll. Respondent indicated that it was paying higher wages than its competitors in the manufacturing portion of the business. Mitchell reminded Respondent that in 1970 the Union had offered it the manufacturing division agreement and this offer was refused. He added that Respondent made its choice and that the Union was not in a position to permit a reduction in benefits for its employees. This issue precipitated a 9-week strike.

Negotiations continued, resulting finally in a new collective-bargaining agreement, executed on September 4, 1973, retroactive to April 1, 1973. The parties resolved the problem of Respondent's competitive disadvantage *vis-a-vis* its manufacturing competitors' wages, by agreeing to wage increases in the second and third year of the contract based on wage increases agreed to by three of Respondent's competitors, Brenner Envelope Corp., herein called Brenner, New York Envelope Corp., herein called New York, and Huxley Envelope Corp., herein called Huxley. These employers were in the third year of their contracts when Respondent was negotiating with the Union. It was therefore agreed that the raise to be granted to Respondent's manufacturing employees for the first year was to be $7 per week, the same amount granted to these employer's employees in the third year of their contracts. Since the contracts of Brenner, New York, and Huxley were expiring in a year, the amounts of raises for their employees in future years was unknown at the time of Respondent's negotiations. Therefore Mitchell suggested and Respondent agreed that, so as to prevent Respondent from setting the pattern for future increases, wage increases for the second and third year of the contract would be the lowest increase agreed on by these other companies. The language agreed to with respect to Respondent's manufacturing employees' wages is set forth below:

WAGE INCREASES

Effective April 1, 1973, no employee of the Envelope Manufacturing Division shall receive less than $7.00 per week wage increase. Effective April 1, 1974, and April 1, 1975, the employees of the Envelope Manufacturing Division shall receive the same increase agreed to by Brenner Envelope Corp., New York Envelope Corp. and Huxley Envelope Corp.

In the event the wage increases agreed to by Brenner Envelope Corp., New York Envelope Corp. and Huxley Envelope Corp. vary, then the wage increases to be paid by Diplomat Envelope Corporation shall be the lowest increase paid by either of the above-mentioned corporations. With regard to employees hired on or after April 1, 1973, by Diplomat Envelope Corporation in the Envelope Manufacturing Division, Diplomat shall not be required to pay such employees more than the scale then prevailing.

The Agreement by Diplomat Envelope Corporation to be bound by the lowest wage increase, as aforesaid, negotiated by Local #447 and the Envelope Manufacturing Industry consisting of Brenner Envelope Corp., New York Envelope Corp. and Huxley Envelope Corp. shall be limited solely to the term of this Agreement which terminates on March 31, 1976, and it shall in no way be considered as precedent in any future negotiations in any legal proceeding or in any manner whatever.[7]

The parties executed a 14-page collective-bargaining agreement, applicable to all its unit employees, except as modified by a 4-page addendum applicable only to Respondent's manufacturing employees. In addition to the wage increase provisions as set forth above, the addendum also provided manufacturing employees less vacation entitlements than for Respondent's printing employees,[8] as well as providing for less sick leave, severance, and layoff notice benefits for manufacturing employees than for printing employees. Further the addendum also included a geographic areas clause and successors and assigns clause, which provides in substance that, if more favorable such clauses are negotiated with Brenner, New York, or Huxley in their forthcoming contracts with regard to either geographic area or successors and assigns, then Respondent shall receive the more favorable clause, at the expiration of the contract and at the option of Respondent in its next contract. Further, if a more restrictive clause is negotiated with these firms, Respondent shall retain its present clause or clauses.

The main collective-bargaining agreement provides for welfare, pension, annuity, and cost-of-living benefits and increases for all its employees. The addendum permits Respondent to pay the moneys due for April and May 1973 to the welfare annuity and pension funds for the

[6] As a result of these negotiations, as of November 1, 1972, Respondent's manufacturing employees' increases exceeded those granted by its competition.

[7] The insertion of the latter paragraph was insisted on by Respondent. Mitchell admitted that Respondent requested this language because it "didn't want it to be a precedent."

[8] This brought Respondent's manufacturing employees more in line with the vacation schedules of its competitors.

manufacturing employees to be paid in five equal monthly payments from September 1973 to January 1974.

The contract also contains the identical settlement of disputes and grievances clause as the 1970–73 contract as set forth above, except that the American Arbitration Association is substituted for the New York State Board of Mediation as the source for selection of arbitrators.

Article 11(a) of the 1973 contract contains a provision that with respect to the welfare fund, Respondent must continue to make payments in the event of a termination of an employee for 60 days after such termination or layoff.[9]

The contract also provides under the cost-of-living clauses that there shall be automatic increases when the CPI raises one point or more to be applied to Respondent's contributions to the Union's welfare, pension, or annuity funds or a general increase as the Union shall direct.[10]

Finally the 1973–76 contract in its welfare pension and annuity provisions provides that payments shall be made in accordance with the rules and regulations of said funds. These provisions had not previously appeared in prior contracts between the parties.

In 1976, the parties negotiated another collective-bargaining agreement. The agreement which runs from April 1, 1976, to March 31, 1979, consists of a 15-page agreement which covers both printing and manufacturing employees, except as modified by a 4-page addendum which applies only to manufacturing employees. Prior to the execution of this agreement and addendum the parties executed a memorandum of agreement.[11] The memorandum on its face does not indicate whether or not it applies to Respondent's manufacturing employees. The memorandum provides for a wage increase of $12 per week for the first year, $12.75 the second year, and $15 for the third year. Additionally, welfare increases for each year and an annuity increase in the third year and an increase in the maximum cost-of-living payments covering the term of the contract are set forth therein.

The memorandum of agreement does not state that all the terms of the prior contract would apply except where changed, but in fact all the terms of the memorandum were incorporated into the main agreement,[12] including the welfare increases which were applied to both manufacturing and printing employees. The first year wage increase of $12 per week was incorporated into the contract for the printing employees and into the addendum covering the manufacturing employees. Thus, it appears and I so find that the memorandum of agreement was applicable to both manufacturing and printing employees.

The addendum covering manufacturing employees is identical to the 1970–73 addendum, except for the annuity and wage provisions. There is no dispute that the parties specifically discussed the annuity revision during the 1976 negotiations. Arroll protested the fact that his manufacturing competitors had not been forced to grant the same fringe benefits as Respondent, and he requested some relief from the Union. Mitchell indicated that he would attempt to bring these competitors up to Respondent's level at the next negotiation, and specifically stated that he would propose annuities for these companies.[13] Mitchell, after again reminding Arroll that he had his chance to agree to the manufacturers contract in 1970 and chose not to do so finally agreed to give Respondent some relief by freezing annuity payments for manufacturing employees at $10 per week.

The addendum as noted included the $12-per-week increase for the first year of the contract for manufacturing employees, payable on April 1, 1976. For the second and third years, April 1, 1977, and April 1, 1978, the addendum included the identical language as in the prior 1970–73 contract, as set forth above, essentially tying these increases to increases granted by Brenner, Huxley, and New York. Included also was the same qualifying language, limiting this clause to the term of that agreement, and stating that "it shall in no way be considered as precedent in any future negotiations in any proceeding or in any manner whatever."

Mitchell testified that the above-cited clause was agreed to in 1976 without any negotiation or discussion, and that he merely changed the dates and included the clause in the addendum, which was signed by Arroll. Mark and Roy Arroll on the other hand testified that there was extensive discussion and negotiation about this clause, and that Respondent again reluctantly agreed to its inclusion. Based on comparitive demeanor considerations, I credit Mitchell. I found Mitchell's responses to be forthright, candid, and sincere, and on the whole found him to be a most believable witness. On the other hand the Arroll brothers, particularly Roy, in my judgment were often argumentative, evasive, and unconvincing in many of their responses, and demonstrated a tendency to contrive their testimony to fit what they believed to be supportive of their positions. I therefore credit Mitchell on this issue, as well as in any other area where his testimony conflicts with the testimony of either Mark or Roy Arroll or both of them.

Subsequent to the execution of the 1976–79 contract, Roy Arroll indicated to Mitchell that there was insufficient work available for a full-time shipping clerk. Arroll therefore requested that the then current shipping clerk, David Smith, be transferred from printing to the manufacturing division, with no loss of pay, but with additional job responsibilities. This was agreed to by the Union, and memorialized in a side letter dated March 10, 1977, and signed by Arroll and Mitchell. The letter reflects Smith's additional job responsibilities, as well as provid-

[9] This provision was carried over from the 1970 contract.

[10] Such a clause also appeared in the 1970 contract, except that annuities were not included therein.

[11] All three documents (the memorandum of agreement, main contract, and addendum) are dated May 14, 1976. However all parties agree that the memorandum of agreement was negotiated and signed at some point prior to the signing of the contract and the addendum.

[12] The main agreement also contains the same settlement of disputes clause providing for the Americnn Arbitration Association as the source of arbitrators, as in the 1973 contract. Additionally the identical clauses relating to contributions to the funds in accordance with the rules of the funds, welfare payments for terminated employees for 60 days, and cost-of-living increases to be paid at the option of the Union as in the 1973 contract were carried over in the 1976 agreement.

[13] At the time Huxley, Brenner, and New York paid less for pension and welfare for their employees and had no annuity in their contracts.

ing that annuity fund contributions for Smith and his successors shall be at the manufacturing division rate. On April 12, 1977, an additional letter was signed by the parties, clarifying the fact that all successors and any replacements of Smith will be included as part of the March 10 addition to the addendum. All parties agree that these letters were to be considered part of the 1976–79 contract.

On April 1, 1977, and in 1978, Respondent instituted the wage increases for its manufacturing employees that had been granted to Huxley's, Brenner's, and New York's employees in the first 2 years of their contracts.[14]

On January 1, 1979, Mitchell sent a letter to Respondent requesting negotiations for a new contract. Subsequently Arroll and Mitchell orally agreed to await the outcome of the Union's negotiations with Atomic, Melo, and Westshore Envelope Co., herein called Westshore, which were the larger printing competitors of Respondent. The Union concluded negotiations with these companies by executing a memorandum of agreement with each company dated June 28, 1979, providing that "except for the following amendments, our Collective Bargaining Agreement which expired on March 31, 1979 shall remain in full force and effect." The memorandums were identical for each company, providing for wage increases of $20 per week, effective on April 1 of each year, and increases in welfare benefits, pension, and progression schedule, and the insertion of a new classification of general helper, duties and rate of pay to be agreed upon. It was also agreed that all moneys due under the cost-of-living plan shall be used to increase contributions to the annuity fund.

On July 11, 1979, at Respondent's office, Mitchell and Pat DeGennaro of the Union met with Roy Arroll and Bob Krassner to commence negotiations. Mitchell presented Arroll with the memorandum of agreement between the Union and Atomic and proposed this as the Union's demands for the printing employees. Mitchell also indicated that, in the last year of the manufacturers' contract, a wage increase of $11 was granted as well as an improvement in vacations. Mitchell proposed that this $11 increase be granted to the manufacturing employees in the first year of the contract and that the vacation improvements also be instituted. This constituted the Union's proposals for the manufacturing employees. Mitchell proposed that these would be the changes requested by the Union from the parties then current collective-bargaining agreement. Nothing was mentioned about any increases for manufacturing employees in the second or third year of the contract.

Arroll agreed to review the Union's proposals and to call Mitchell and set up the next meeting.[15]

The parties met next on August 1, 1979, at the office of Mark Arroll. Present were Mitchell, DeGennaro, Roy, and Mark Arroll. Mark Arroll began the meeting by complaining about the fact that the Union was going to arbitration over the discharge of Charles White.[16] Mitchell replied that the Union had no choice. Mark continued that he felt it was unfair for Respondent to be forced to pay for welfare severance for 60 days to employees like White who were discharged for cause. Mitchell responded that he was not at liberty to negotiate the trust agreement or the rules and regulations of said funds. That subject was debated back and forth and led to a discussion of the arbitration procedure in the contract. Mark Arroll contended that the arbitration procedure currently utilized of selecting arbitrators from the American Arbitration Association (AAA) was too expensive. It was suggested that there be a switch from using the AAA to the New York State Board of Mediation, as a source for arbitrators, since this would result in a substantial reduction in fees. It was agreed that the New York State Board of Mediation would be substituted for the AAA for the selection of arbitrators.[17]

The conversation turned to the wages and benefits for Respondent's manufacturing employees. The Union's proposal for an $11 increase for the first year of the contract was discussed. DeGennaro indicated to Respondent that the $11 increase for that particular year was more than a fair amount. Respondent's officials agreed on this figure.

This finding is based on the credited testimony of DeGennaro, who impressed me as a believable witness. I do not credit Mark Arroll's contrived testimony that DeGennaro stated that the $11 increase would be a one time increase and that there would be no increase for the next 2 years. Even his brother Roy contradicted Mark on this point, denying that there was any mention of whether there would be raises in the remaining 2 years of the contract. This corroborates Mitchell and DeGennaro, and I so find that there was nothing said by the Union or Respondent at the meeting about whether or not raises would be provided for in the second and third years of the contract with respect to manufacturing employees.

Roy Arroll brought up the fact that Respondent was the only Employer engaged in manufacturing who was paying an annuity and that Respondent was paying higher pension and welfare than its competitors.[18] Arroll

[14] The raises were $10 per week the first year and $11 for the second.

[15] Arroll denies receiving any copy of the Union's memorandum with Atomic or any other company during this or any meeting. He contends that he was given a laundry list of demands from the Union which were discussed. Mitchell and DeGennaro denied ever submitting such a list to Arroll, and I credit their denials. In addition to my assessment of the credibility of Arroll *vis-a-vis* Mitchell as outlined above, I also rely in this instance on the fact that Roy Arroll could not produce a copy of such demands nor could his brother Mark who denied receiving any such demands, although Roy Arroll testified that he probably furnished his brother with such a copy. Additionally the agreement ultimately signed by Respondent coincided with the Atomic memorandum in most respects using identical language.

[16] White had been discharged by Respondent for allegedly assaulting Krassner.

[17] The Arroll brothers testified that the agreement reached with respect to the arbitration clause was to substitute the process of mediation with arbitration. I do not credit such testimony and instead credit Mitchell's and DeGennaro's version as set forth above. In addition to my comparative demeanor assessments discussed *infra*, I also rely herein on Mark Arroll's January 7 letter setting forth Respondent's objections to the alleged agreement, which will be discussed below. This letter fails to mention this alleged discrepancy, although mentioning numerous others. Thus, I find this to be a mere afterthought conjured up by Respondent to justify not signing the agreement, and further tends to corroborate the union witnesses' testimony on this issue.

[18] At the time Respondent was making higher pension and welfare contributions than New York, Brenner, and Huxley, and neither of these

Continued

requested that either the annuity payment be eliminated or modified for Respondent, or that Respondent's total wage package including fringe benefits be equalized with these competitors.

Mitchell replied that he could not take away or reduce the annuity that the people have and that he could not agree to wages for employees which were not comparable in the industry. Mitchell did state that Respondent's manufacturing competitors (New York, Huxley, and Brenner) would probably come closer to Respondent's pension payments in the upcoming negotiations and that he would propose an annuity for these firms in these negotiations and would try to get it in the next contract to be signed.[19]

Mitchell also reminded Respondent that he had frozen the annuity at $10 per week for its manufacturing employees in 1976, and that Respondent had its chance in 1970 to agree to the manufacturers contract *in toto*, and had declined to do so.

Based on the failure of Respondent's officials to contest the Union's specific proposals for printing employees, and, although Respondent's proposals such as no welfare payments for discharged employees were still on the table, Mitchell concluded that in his mind there was sufficient agreement reached for him to draw up a proposed memorandum of agreement, which he indicated that he would do. None of Respondent's officials made any response to Mitchell's assertion that he would draw up such an agreement, and the meeting concluded.

Mitchell then went back to his office and prepared a memorandum of agreement, dated August 3, 1979. The agreement uses the same preliminary language as is included in the Atomic, Melo, and West Shore memoranda of agreement; "Except for the following amendments our Collective Bargaining Agreement which expired March 31, 1979 shall remain in full force and effect."

The first portion of the agreement is entitled manufacturing and printing divisions. It sets forth the term of the agreement, April 1, 1979, to March 31, 1982, increases to the Union's welfare fund totaling $21 per week per employee over a 3-year period, and a provision extending the trial period for new employees from 30 to 60 days if Respondent requests. In addition the agreement contains the following language; "3. *Settlement of Disputes, Differences and Grievances.* The American Arbitration Association shall be replaced by the New York State Board of Mediation."

The agreement then divides into a section entitled manufacturing division only. Section 1, entitled wages, states, "Effective April 1, 1979 no employee shall receive less than a weekly increase of Eleven Dollars ($11.00) per week." Nothing in the agreement refers to an increase in 1980 or 1981 for the manufacturing employees. Section 2 of the portion of the agreement restricted to manufacturing employees permits Respondent to pay inexperienced employees 75 cents an hour below minimum, but that such employee must reach the minimum by receiving increases of 25 cents per hour per month. Section 3, entitled vacations, provides for slight increases in vacation entitlements from the prior agreement.[20]

The memorandun then includes a section entitled printing division only, which follows the Atomic memorandum of agreement with the Union. As for wages, it provides wage increases of $20 per week per year, effective on April 1, 1979, 1980, and 1981. In addition, it was agreed that cost-of-living increases would be paid into the annuity fund, the current progression schedule shall be increased from 18 to 24 months, and a pension increase of $3 per week per employee effective April 1, 1981, was included. Additionally under a section headed "New Classification," it was provided, "the classification of General Helper shall be added to our Agreement, the duties and rates of pay shall be that which is agreed upon by the Envelope Printers (Melo, Atomic and West Shore) who have collective bargaining agreements with Local 447."[21]

Mitchell, after preparing the memorandum, called Roy Arroll and arranged for a meeting for August 6 at the plant. Present were Mitchell, DeGennaro, Roy Arroll, and Bob and Beatrice Krassner. Mark Arroll was not present. Mitchell presented Respondent with his proposed memorandum of agreement as set forth above. Once again Roy Arroll talked about obtaining some relief by virtue of Respondent having to pay an annuity and higher fringe benefits than its manufacturing competitors. Mitchell repeated what he had said in prior meetings that the Union hoped to obtain an increase in pensions in the next manufacturers contract and it would propose an annuity and try to obtain same from Respondent's competitors. Mitchell also repeated that the Union had given Respondent relief in 1976 by freezing the annuity for manufacturing employees and could give no more and again reminded Arroll of his decision in 1970 not to accept the manufacturer's contract *in toto* as offered by the Union.

Extensive discussion occurred with respect to Respondent's obligation to pay welfare for 60 days even where employees are discharged for cause. Particular mention was made of the Charlie White incident where Respondent discharged him for allegedly assaulting Bob Krassner, and the Union was claiming welfare payments

companies was paying for an annuity. Respondent employed 14 employees engaged in manufacturing functions, and 4 involved in printing work. Brenner employs approximately 100 employees, New York 200, and Huxley 50–55.

[19] I do not credit Mark or Roy Arroll's testimony that Mitchell guaranteed or assured Respondent that its competitors would get an annuity in their next contract. In fact Roy Arroll, when pressed on cross-examination as to the words used by Mitchell in assuring Respondent that these firms would get an annuity, admitted that Mitchell had merely promised to make a proposal to these companies for an annuity. Arroll testified that "when they indicate that they're going to propose something you can rest assured they're going to get it," and admitted that, based on this assumption of his, he took the Union's promise to propose an annuity as being tantamount to a promise to secure such an agreement from his competitors. This is an example of the contrived testimony of Arroll, which supports my conclusion to discredit him generally as indicated above.

[20] For example the prior agreement called for 2 weeks' vacation for employees employed from 1–10 years, and 3 weeks for those employed 10–20 years. The memorandum of agreement calls for 2 weeks' vacation for employees employed from 1–9 years and 3 weeks for 9–14 year employees, with additional days for 14–18 year employees.

[21] The Atomic memorandum provided for the addition of this new classification, with a provision that the duties and rates of pay were to be agreed upon by the Company and the Union.

for him for 60 days after discharge. Bea Krassner expressed particular outrage at this requirement, and could not understand how the Union could request payments for one who had assaulted her husband, a high ranking official and officer of the Company. Mitchell responded that you cannot judge the Union or the rules by one or two incidents. He explained that the requirement of continued contributions is a rule set by the trustees and he (Mitchell) could not change this policy.

Arroll then asked about obtaining some relief with respect to a night-shift differential. The parties then negotiated a revision in the prior agreement with respect to this clause.[22] The agreement which Mitchell inserted handwritten on the last page of the memorandum of agreement called for an 8-percent differential from April 1, 1979, to March 31, 1981, and 10 percent from April 1, 1981, to March 31, 1982.

At that point Krassner and Arroll caucused and agreed to sign the memorandum. Arroll signed on behalf of Respondent and Mitchell for the Union. Mitchell and DeGennaro then proceeded downstairs to the plant and obtained ratification of the agreement. The employees were specifically informed by Mitchell that the new contract will provide for wage increases for the manufacturing employees of $11 a week for the first year, and for the second and third years of the contract they would be receiving the same wage increase negotiated by the Union with New York, Brenner, and Huxley. There were no representatives of management present during the ratification vote, nor does the record reveal that any official of Respondent became aware of what Mitchell informed the employees as to what the contract would contain. Mitchell did inform Arroll that the contract had been ratified, and in a subsequent conversation in late August, the parties agreed that Arroll would be permitted to pay the retroactive wage increases in two parts.[23]

Two or 3 days after the memorandum of agreement was executed, Roy Arroll informed his brother Mark that he signed the agreement with the Union. Mark indicated that he was surprised that Roy had signed any agreements. Roy replied that it looked like a reasonable enough deal so he signed it. Mark responded, "[A]ll right look, whatever you did you did, we can't undo, let's wait until the formal contract comes in and you know, we'll see what if you signed it, you'll have to sign it."

On September 14, 1979, Mitchell as trustee of the Union's annuity fund mailed a letter to Respondent indicating that effective October 1, 1979, its contribution to the annuity fund would be increased to $21 per week per member. Respondent sent no response to this letter to either the Union or the annuity fund.

Respondent did not make any payments to the fund at this $21 rate. Payments were made by Respondent at the $18 rate for printing employees and $10 for manufacturing employees covering periods of time up to December 1979.[24]

In December Mitchell prepared what he believed to be the collective-bargaining agreement reached by the parties by redrafting those terms of the 1976–79 agreement and addendum as modified by the memorandum of agreement executed on August 6. Mitchell mailed a copy of the proposed agreement with a covering letter dated December 24, 1979. The letter indicates that the final draft of the Agreement is enclosed, requests that Respondent review and sign the document, and concludes by stating, "should there be any questions, please contact the writer."

Shortly after receiving the proposed agreement from the Union, Roy Arroll read it over, and contends that he noticed certain discrepancies between the agreement and what he believed was agreed to on August 6. He then sent the agreement to his brother Mark for his review. Mark Arroll sent a letter to his brother Roy, dated January 7, 1980, setting forth his opinion as to the proposed contract and his recommendation not to sign same. This letter constitutes, according to Mark Arroll, Respondent's objections to signing the agreement. Said letter is set forth below:

RE: Union Contract

Dear Roy:

I have reviewed briefly the copy of the proposed union contract sent to you by Local 447. As I previously advised my strong recommendation is that you not sign it. This proposed agreement has many items in it not agreed to and omits various items that were agreed to.

Before discussing these problems it should be kept in mind that you agreed pursuant to a "memorandum of Agreement" dated August 3, 1979 that the prior agreement which expired on March 31, 1979 was to be extended until March 31, 1982 and was to ramain [sic] the same except for the changes specifically set forth in the memorandum of Agreement. With this background in mind here are the problem areas my initial brief reiview [sic] of the proposed contract discloses.

One final preliminary note. Before going any further please have in front of you the agreement for 1976–1979, the addendum to Agreement dated 5/14/76, the memorandum of Agreement dated August 3, 1979 and the proposed new contract with attached riders covering the period 1979–1982.

1. The vacation schedule found on pages 6–7 (paragraph ninth) omits to state that such schedule is only for the Printing or non-manufacturing divi-

[22] The prior addendum provided for a 10-percent differential for night-shift employees. Respondent had not instituted such a shift, but at the time of the 1979 agreement was contemplating doing so.

[23] Note that the agreement provided for wage increases retroactive to April 1, 1979. Respondent paid the increases to its employees as agreed upon.

[24] Respondent also continued to make pension and welfare contributions to the appropriate funds for this period of time. Respondent generally made its payments a number of months past the due date. For example the payments for April were made by check dated August 2, and for May by check dated October 30, and so on. The last payments received for the month of November 1979, was made by check dated March 24, 1980.

sion and does not set forth the vacation schedule for the manufacturing division which is *less.*

The vacation schedule for manufacturing is supposed to be as set forth in the memorandum of Agreement dated August 3, 1979. Two brief comments should be made about this schedule: (a) this was never discussed or agreed to at our July 1979 meeting, and (b) there are some obvious typographical errors. It should read "6 months but less than 1 year—1 week; 1 year but less than 10 years—2 weeks" etc. as the old agreement (memorandum dated 5/14/76) read.

2. With respect to wages, Pages 7-8, paragraph tenth, it should be made clear that provision only applies to printing.

3. With respect to wages there is a new classification added "platemaker/stripper" with wages of $245.50, $265.50 and $285.50 for 1979, 1980 or 1981 respectively. This was not agreed to. This category was not in the old contract and is not mentioned in the memorandum of Agreement dated August 3, 1979.

4. Also with respect to wages there is a new category (p. 8) "General Help" [sic]. The memorandum of Agreement dated August 3, 1979 page 3 refers to a new category of "general helper" and says we will pay the lowest as negotiated by the Envelope Printers (Melo, Atomic and Westshore). We should see their signed contracts before agreeing to this. If not we can negotiate our own lower salary.

5. Again with reference to wages, there is a clause on page 8 that says in substance employees performing camera work are to receive $5.00 more per day that [sic] the platemaker-stripper contract rate of pay. This was not agreed to. The old contract made no mention of this and the memorandum of Agreement dated August 3, 1979 said the old contract was to apply except as provided therein. The memorandum of Agreement also makes no mention of this.

6. Again with wages, there are two "riders" attached to the contract which ends with page 15. The first rider is entitled "Addendum to Agreement dated 8/3/79." There are several errors undoubtedly caused by the secretary copying from an old agreement and forgetting to change the date or tense, etc.

a. On Page 1, the first sentence with the heading "Vacation" the words "the effective date of this agreement" after "April 1, 1973" should be deleted.

b. The vacation schedule should conform to my comments in "1" above.

c. The entire paragraph entitled "Geographic Areas Clause and Successors and Assign Clause" (P. 1-2 of Addendum to Agreement dated 8/3/79) should probably be eliminated.

d. [Sic] With regard to Annuity benefits the Union has created chaos. This is one of the most important problem areas.

Again as a reminder this contract according to the memorandum of Agreement dated 8/3/79 is supposed to be the same as the old 1976-1979 agreement unless something to the contrary is stated.

The old Agreement (1976-1979) on page 13 paragraph 15 (b) said annuity payments are $10.00 per week per employee and that effective April 1, 1978 that was to be increased by $2.00 i.e. $12.00 per week. However, the Addendum to the Agreement dated 5/14/76 on page 3 provides that notwithstanding the provisions of Article 15(B) the *maximum* contribution for the term of this agreement (1976-1979) is $10.00 per week per employee.

I interpret this to mean that the maximum contribution to the annuity is $10.00 per week. If we have paid more we are in my opinion entitled to get a refund or a credit. In my opinion the simple solution is to calculate the overpayment and take a credit against future payments with an accompanying letter to the Union.

The confusion here is just beginning. The new contract is supposed to have the same terms as the old contract; however, this is not exactly the case. The new contract on page 13, paragraph 15(b) calls for $18.00 a week which is not in accordance with the old contract or the memorandum of Agreement dated August 3, 1979. To further confuse the situation in the first "rider" attached to the new proposed contract entitled "Addendum to Agreement" dated 8/3/79 on page 2 under the heading "Annuity Benefits" there is the same language as before namely notwithstanding the provisions of paragraph 15(b) the maximum contribution to the annuity for the term of the Agreement (1979-1982) is $10.00 per week per employee.

e. In the same addendum as referred to above on page 2 under the heading "Wage increases" there is a provision for an $11.00 per week increase effective April 1, 1979. That is what we agreed to in the memorandum of Agreement dated August 3, 1979. However, the Union goes on to provide that for 1980 and 1981 we are to pay the same increase as Brenner, New York Envelope or Huxley. We never agreed to this. There is nothing in the memorandum Agreement dated August 3, 1979 to this effect, nor was it ever discussed in my presence. My understanding was that there was only one increase of $11.00 per week retroactive to April 1, 1979 and that's what we should stick to.

All references on pages 2-3 to using Brenner, New York Envelope and Huxley as some sort of guide should be eliminated.

In the addendum to Agreement dated 5/14/76 on pages 3-4, we made reference to Brenner, et al.; however, we specifically stated that such reference "shall be limited solely to the term of this Agreement which terminates on March 31, 1979, and it shall in any [sic] way be considered as precedent in any future negotiations in any legal proceeding or in any manner whatever." The Union has chosen to ignore this clear and unequivocal language.

7. The second rider entitled "Tenth: Wages" lists various classifications and wage rates whose accura-

cy I cannot confirm as they were not set forth in the old agreement.

8. Either all references to David Smith should be deleted including the footnote on the second rider as in "7" above or the language should be reworded so as to read as "David Smith formerly performed" or perhaps better, a brief but inclusive description of all services performed by David Smith without mentioning him by name.

9. All references to the Union's or trustee's rules and regulations should be eliminated.

10. Paragraph Eleventh—Welfare benefits—all references to us paying welfare benefits for 60 days after termination or layoff should be eliminated.

11. Paragraph "Thirteenth" should be reworded so that only the Union can make a claim for a worker and not the worker or perhaps vice versa but not both. This is the Charles White problem in part. The Union's lawyers even suggested this change.

12. There are a few minor miscellaneous changes such as cost of living I would recommend but which are not worthwhile discussing in this already overlong letter.

13. The agreement should be properly dated. I can only guess why the date of June 28, 1979 is given on page 15. It should be January—, 1980 or whenever.

It is clear to me and I am sure to you that the Union has and intends to take advantage of every conceivable clause in their favor. We should do no less. If by way of example the Union through inadvertence or otherwise did not put a clause in the memorandum of Agreement dated August 3, 1979 that the manufacturing division does not get any increase beyond the initial one of $11.00, that should be enforced. They should not be permitted to have all the terms of the memo agreement binding on us without giving any concessions in the main agreement but allowing them to insert terms in the main agreement which were never in the memo agreement when it is to the Union's benefit.

That the Union intends to push to the limit and beyond is best illustrated by their demand for various welfare, disability insurance payments and the like for people such as Charles White who were caught stealing and/or who simply left and never returned. They are even making claims for benefits never contracted for such as insurance, disability, etc. I strongly urge that all these claims and annuity claims be resolved before any new Union contract is signed. There should be a formal release signed by the Union dropping and resolving these claims.

Please call me when you get a chance.

Mark Arroll testified that he attempted to reach Mitchell by phone to inform him of Respondent's objections to the Agreement, but he was unsuccessful. Respondent did not at that time notify the Union in writing of its position on signing the Agreement.

On January 25, 1980, Respondent terminated Thomas Dugan, allegedly for two unauthorized absences. By letter dated February 6, 1980, DeGennaro notified the New York State Board of Mediation, with a copy to Respondent, that it had been unable to resolve a dispute with Respondent regarding Dugan's discharge, and it was submitting the dispute to the board for resolution.

On February 20, 1980, Mitchell wrote a letter to Respondent inquiring why the Union had not heard from them as to signing the contract submitted on December 29.

On February 19, 1980, Mark Arroll sent a letter to Parsonnet, Duggan & Pykon, the Union's attorneys at the time. This letter was in response to Parsonnet's February 13 letter to Arroll requesting payments to the Union's funds through January 1980. Arroll, in his response disputing certain of Parsonnet's assertions as to what moneys were owed, for the first time takes the position that the proposed contract does not reflect what the parties agreed to in their August memorandum. The letter goes on to say that Arroll and Parsonnet had allegedly, when the Charles White problem came up, agreed that, in the event of a dispute, only the Union could demand arbitration and not the employee, and that the new agreement did not contain such a provision.[25]

Arroll then pointed out that he felt the agreement reached called for nonbinding mediation, but that the contract submitted by the Union provided for binding mediation or in other words arbitration.

Arroll concluded the letter by stating that he intended to move to stay the arbitration requested by the Union based on Dugan's discharge, which he subsequently did on February 26, 1980.[26] In its moving papers in New York State Supreme Court, Respondent alleged that no contract was in existence at the time, contending that the Union's proposed contract was not in accord with the agreements reached on August 3, specifying many of the same objections set forth in Mark Arroll's January 7 letter to his brother Roy. The motion also stated that, in the event mediation was ordered, it should be nonbinding, since this was agreed to by the parties. The motion also asserted that service of the Union's demand was improper. The court granted the motion to stay solely because of deficiencies in service of the Union's demand for arbitration.

On February 27, 1980, the annuity fund notified Respondent that as of August 1, 1980, annuity contributions for printing employees would be $24 per week.

On March 20, 1980, Mitchell notified Respondent by letter that the Union had completed its negotiations with New York, Brenner, and Huxley and noted that wage increases of $15 per week were therefore payable on April 1, 1980, and April 1, 1981.

Respondent responded on March 28 by a letter from Roy Arroll to Mitchell rejecting any obligation to pay this increase, since the August 3 memorandum contains

[25] As noted above, Charles White was terminated for assaulting Krassner and Respondent was most unhappy about having to arbitrate his discharge and having been charged by the Union for welfare payments for the 60-day period subsequent to his discharge.

[26] Although Arroll phrased the letter and his court papers in terms of moving to stay mediation, it is clear he was referring to binding mediation or arbitration.

no reference to Respondent's being bound by any increases granted by these other firms.

Respondent did not grant the increases to the manufacturing employees as of April 1980, but did grant the $20 increase per week to its printing employees. Arroll testified that, since he had clearly agreed to pay this increase, he felt obligated to the printing employees who had been counting on the raise to institute it on April 1, 1980, and he did so after consultations with his brother Mark.

On April 14, 1980, the Union filed another demand for arbitration with respect to Respondent's failure to pay the manufacturing wage increase, and failure to make pension, welfare, and annuity payments to the funds.[27]

By letter dated April 14 from Mark Arroll to Mitchell, Respondent announced that in its view the Union has rescinded the memorandum of agreement executed on August 3, 1979, and that therefore there was no contract in existence. The letter further announced that he (Mark Arroll) was recommending to Respondent that it continue to pay the wages called for in the memorandum, but not to pay any fringe benefits, such as annuities, pension, welfare, etc. until the matter was resolved.[28]

Arroll also added in the letter that in his view the memorandum as to annuities called for the prior contracts rates, i.e., $10 per week, and therefore Respondent had overpaid for several months and would request a return of the alleged overpayment.

The letter concludes by stating that dues would continue to be checked off for a reasonable period of time until the parties have a chance to resolve the matter.

On April 22, 1980, Respondent commenced an action in the Supreme Court, New York county, requesting that the Court rescind the memorandum of agreement signed by Respondent because of the Union's fraud,[29] or by reason of mistake and because of subsequent acts and breaches of the Union,[30] for a declaratory judgment that certain provisions of the memorandum are null and void or unconcionable, unconstitutional, or against public policy, or if the Court finds a valid agreement declaring the correct meaning of the contract, and for damages. Additionally, Respondent sought to enjoin the Union continuing any civil actions against Respondent including any attempted arbitration or mediation.

Shortly after the filing of this lawsuit, Mitchell and Roy Arroll had a telephone conversation, in which they were discussing various subjects. During the course of this conversation, Mitchell referred to the proposed contract that he had sent to Respondent. He mentioned the fact that the Union had inadvertently left out a clause on hiring of new employees which had been agreed to on August 6 and was included in the memorandum. Mitchell stated that the Union would put this in a separate letter and send it to Arroll.

Mitchell then referred to Respondent's lawsuit and it's contention therein that the Union had included a platemaker-stripper clause that had not been agreed to. Mitchell reminded Arroll that they had made an oral agreement years ago, that, whatever the Union gives to the Envelope Printers, Respondent would also get. Mitchell informed Arroll however that if he did not want this clause included he (Mitchell) would agree to take it out of the contract. Arroll did not respond to this offer of Mitchell.

The clause in question provides for a new job classification entitled platemaker-stripper with a minimum salary of $245.50, $265.50, and $285.50 effective April 1, 1979, through April 1, 1981. It also provides that employees performing camera work shall receive $5 per day over the platemaker-stripper contract rate of pay. It is undisputed that neither of these provisions were included in the prior contracts nor in the August memorandum signed by the parties.

Roy Arroll testified that he would not have signed the August memorandum if it had included the camera-platemaker-stripper clauses as set forth above. At the time Respondent had no employee in such a job classification. Frank Cano, a long-term employee making $350–$400 per week, was the only employee regularly performing such work. Thus the $5 differential would be inapplicable to Cano, since he was and is making well above the minimum salary in the contract. When asked how the insertion of this clause could cost Respondent any money, Arroll replied that the Union could say that Cano was a foreman and he would then have to hire a new man to perform this work. However, Arroll admitted that the Union had never taken the position that Cano, a member of the unit, was a foreman nor that he should not perform this work.

On May 7, 1980, the Union filed a motion to remove Respondent's State Court action to the Federal Court, and served a counterclaim requesting a declaration that the parties entered into a valid contract.

On July 1, 1980, Respondent posted a notice that, effective immediately, it would no longer check off or

[27] Arbitration was again stayed by the state court for failure to make proper service.

[28] Respondent in fact failed to make any more payments to the funds after this date. Since Respondent, as noted above, was traditionally several months behind in its payments, the result was that payments were made into the funds only through November 1979, and Respondent has continued to fail to make any payments to the funds for any of its unit employees to date.

[29] The fraud allegation refers to Respondent's claim that union representatives materially misrepresented to Respondent's officials that it would obtain the same wage and fringe benefits from Respondent's competitors in its upcoming negotiations. It was alleged that Respondent would not have signed the memorandum but for these misrepresentations by the Union. With respect to this issue Roy Arroll testified that, in each of the past three negotiations, Mitchell made similar "assurances" to him that it would obtain the same benefits from Respondent's competitors, and yet he signed contracts in the past and signed the instant memorandum without obtaining such assurances in writing. In addition as noted above, when questioned closely on the words used by Mitchell, he admitted that Mitchell merely said that he would make such proposals and try to obtain them in negotiations with his competitors.

[30] Referring to the Union's proposed agreement in January 1980, which allegedly differed from the agreement reached in August 1979. It was also alleged by Respondent that the memorandum of agreement was signed on August 6, 1979, by Respondent in the absence of and without prior knowledge or consent of its attorney. In these connections, Arroll, in cross-examining Mitchell at the hearing, asked him why he had not notified Mark Arroll of the August 6 meeting and why he signed the agreement without Mark's being present. Mitchell responded that if Mark's presence were required it was up to Respondent to have him there. Nothing was ever said by Roy Arroll or any Respondent official to the Union that Mark Arroll's presence or approval was required before an agreement could be reached.

withhold dues from any employees' salary and would not remit such dues to the Union.

On July 9, 1980, DeGennaro, at that time the president of the Union, sent a letter to Respondent, stating that upon receiving the terms of the August memorandum together with the final version of the contract sent by the Union he noticed a clause inadvertently omitted from article eight. The clause was quoted as follows:

> The Union, upon written request shall grant the Employer with the consent of the employee involved, an extension of the trial period not to exceed an additional thirty (30) calendar days.[31]

By letter dated March 18, 1981, DeGennaro notified Respondent that it was in arrears since December 1979 to the Union's annuity, pension, and welfare funds, in the sum of approximately $48,000.

On May 11, 1981, the Honorable Justice Charles S. Haight, Jr., of the United States district court, issued a memorandum opinion and order in Case 80 Cir. 2668-CSH, dealing with a motion made by Respondent herein to remand the action filed by it, back to the state court.

Judge Haight found that the complaint states a cause of action under LMRA Section 301, and the district court has jurisdiction to determine whether there is a valid contract. Although Respondent characterized its complaint in terms of raising state law issues, the Judge found that this "is belied by the express language of the complaint, which reveals this is in fact an action to enjoin arbitration."

Accordingly, Judge Haight denied Respondent's motion to remand the action to the state court. The matter has been placed on the "Suspense Docket" of the court, pending Board disposition of the instant complaint.

III. ANALYSIS

A. *The Prior Court Actions*

Respondent at the outset of the hearing and again in its brief moved to dismiss the instant complaint "as a matter of right and of discretion, because of the prior actions and proceedings pending."

As a result of Judge Haight's decision to deny Respondent's motion to remand the prior state court actions back to the state court, the only litigation between the parties which is now pending is Respondent's state court lawsuit now removed to the Federal Court. Respondent argues that since this action was commenced prior to the National Labor Relations Board proceeding and the Union has asserted a counterclaim in that action, requesting essentially the same relief that the Board would grant, that the instant complaint should be dismissed, and the issues resolved by the Federal Court. I do not agree.

It is well settled that the Federal Court has concurrent authority or jurisdiction to decide matters arising under collective-bargaining agreements, even where conduct arguably protected or prohibited by the Act may be involved. *Smith* v. *Evening News Association*, 371 U.S. 195 (1962).

It has also been recognized by the Supreme Court that the Board is "vested with primary jurisdiction to determine what is or is not an unfair labor practice." *Kaiser Steel Corp.* v. *Mullins*, 109 LRRM 2268 (1982).

Historically, conflicts arising from dual jurisdiction have usually been avoided by discretionary action on the part of the judiciary whereby lawsuits are stayed pending disposition by the Board of the unfair labor practice.[32] In fact this was the course chosen by Judge Haight in the instant matter. It would be anomalous indeed not to mention a waste of everyone's time and resources to dismiss the instant complaint, and relegate the parties to go through another hearing in Federal Court.

It is clear that the special administrative competence of the Board, as recognized by Supreme Court, should certainly take precedence in the instant case, particularly over a Federal Court proceeding which has been stayed.[33]

Accordingly, I find no legal or equitable[34] basis for Respondent's assertion that the pendency of the Federal Court action precludes Board action and mandates dismissal herein.[35]

I shall therefore deny Respondent's motion to dismiss and shall proceed to decide the merits of the instant complaint.[36]

B. *Did the Parties Reach Agreement on Terms of a New Contract?*

It is well established that an employer's failure to reduce to writing an agreement reached with a union constitutes an unlawful refusal to bargain. *H. J. Heinz Company* v. *N.L.R.B.*, 311 U.S. 514 (1941). The principal question, therefore, is whether the parties reached agreement, or put another way, whether the parties when they signed the memorandum of agreement on August 6 had reached a "meeting of the minds" on terms and conditions of employment for Respondent's employees.

The expression "meeting of the minds" does not require that both parties have identical subjective under-

[31] This was the hiring clause referred to by Mitchell in his conversation with Roy Arroll, set forth above, shortly after Respondent's lawsuit was filed.

[32] *Newport News Shipbuilding and Dry Dock Company*, 253 NLRB 721, 728 (1980).

[33] See *Newport News, supra*, where the Board refused to even give *res judicata* effect to a Federal Court decision already decided on the same issue.

[34] Respondent's argument that the Union by asserting a counterclaim in the Federal Court action has somehow waived the rights to Board determination is without merit. The Union should not be penalized for preserving its rights in said action should the Federal Court decide to adjudicate the respective claims asserted.

[35] *New Orleans Typographical Union No. 17 [E. P. Rivas]* v. *N.L.R.B.*, 368 F.2d 755, 767 (6th Cir. 1966); *Jacobs Transfer, Inc.*, 227 NLRB 1231 (1977); *Newport News, supra.*

[36] As an additional reason for denying Respondent's motion to dismiss and defer to the Federal Court proceeding, I note that the instant complaint contains some allegations not dependent on the existence of a current contract. Thus the complaint alleges that Respondent unilaterally changed various terms and conditions of employment of its employees, and, as will be discussed more fully *infra*, a violation of the Act can be found, even if the parties did not reach agreement on the terms of a new contract as alleged in the complaint. This issue would not seem to be cognizable under the Federal Court's Sec. 301 jurisdiction. Therefore, to bifurcate the case and defer part of the instant complaint to the Federal Court would be a useless and unwieldy procedure.

standings on the meaning of material terms of the contract. *Vallejo Retail Trade Bureau and its Employer-Members*, 243 NLRB 762 (1979). Rather, subjective understandings or misunderstandings as to the meaning of terms which have been assented to are irrelevant, provided that the terms themselves are unambiguous judged by a reasonable standard.[37]

Where the alleged agreement reached is ambiguous, extrinsic or parol evidence has relevance in determining whether agreement or a meeting of the minds has been reached.[38]

The bargaining history and all other relevant circumstances surrounding the negotiations must be examined to determine if an enforceable agreement has been reached. *McKinzie, supra; North Coast Counties District Council of Carpenters, et al. (Cotati Cabinet Manufacturing Corp.)*, 197 NLRB 905 (1972).

In applying the above-cited principles to the facts herein, there is no dispute that the parties executed a memorandum of agreement on August 6. The Union, on December 29, prepared and sent to Respondent a proposed contract allegedly incorporating the agreement reached on August 6.

Respondent contends that the Union's proposed contract deviates significantly from the terms of the August memorandum, and that therefore no meeting of the minds was reached on the terms of a new agreement.

It is clear that, by signing the memorandum, the parties agreed to extend the terms of the 1976 contract, except as modified by the memorandum. There is disagreement as to the interpretation of this language, particularly as it relates to certain clauses in the 1976 contract which the parties did not specifically change in the memorandum, and which were not specifically discussed during the 1979 negotiations.

The most substantial of these disagreements, which Respondent relies on most heavily in its brief in arguing that no agreement was reached, relates to wage increases for manufacturing employees. The memorandum calls for wage increases for manufacturing employees of $11 per week, effective April 1, 1979. The memorandum is silent as to second and third year wage increases for these employees.[39]

The 1976 contract provides second and third year increases for manufacturing employees to be based on wage increases agreed to by three of Respondent's competitors. This contract also contains language that the agreement to be bound by the wage increases negotiated by these firms "shall be limited solely to the term of this Agreement which terminates on March 31, 1979, and it shall in no way be considered as precedent in any future negotiations in any legal proceeding or in any manner whatever."

I find that the language of these documents creates an ambiguity as to what the parties intended when the memorandum was executed, as to second and third year increases for manufacturing employees. This ambiguity must be resolved by an evaluation of all the surrounding circumstances, including the bargaining history of the parties' prior negotiations.

My evaluation of the relevant circumstances convinces me, and I so find, that when Roy Arroll signed the August memorandum he intended to agree and knew full well that his manufacturing employees would receive wage increases in the second and third year of the contract based on increases negotiated by his competitors. I am supported in this conclusion by an examination of the bargaining history. The parties had established in 1973 a pattern of calculating wage increases for manufacturing employees, by utilizing the figure agreed upon in the third year of the contract of Respondent's competitors as Respondent's first year increase, and it's second and third year increases to be based on the first 2-year increases agreed to by these competitors in their succeeding contracts. This agreement was reached as a part of the settlement of a 9-week strike in 1973, and included the same qualifying language set forth herein, that the agreement is not to be a precedent for future negotiations. However, notwithstanding this qualifying language, the parties in 1976 executed a contract containing the same pattern of wage increases and the same qualifying language without any specific negotiation or discussion. In 1976, a memorandum of agreement was executed, and, although it did not contain language that the terms of the prior agreement applied except where modified, the parties treated the memorandum in that fashion. Thus, the first year wage increase for manufacturing employees, the welfare provisions which applied to both manufacturing and printing employees, and other provisions relating to printing employees set forth in the 1976 memorandum of agreement were incorporated into the 1976 contract. Therefore, Respondent's argument that the qualifying language that the clause shall not be a precedent for future negotiations means that it was not intended to be included in subsequent contracts without specific oral discussions or agreements is not supported by the parties' bargaining history.

Thus, the qualifying language does not prohibit the parties from agreeing to continue the same clauses in future contracts, nor does it refer to in what fashion or form the parties can manifest their agreement to extend these clauses in future contracts. The clause does not say that the parties cannot agree to an extension of this clause by simply agreeing to extend all the terms of the prior contract, subject to certain specified exceptions. In fact at the time that these clauses were first negotiated, the parties had not bargained using the device of signing a memorandum of agreement extending the old contract with modifications, nor is there any evidence that the parties at that time contemplated bargaining in that fashion. Therefore I do not believe that the clause was meant to cover this type of bargaining situation. I note that, at the time these clauses were first negotiated, the Union had taken the position during bargaining that Respondent, by failing to take advantage of the Union's prior offer in 1970 of accepting the manufacturer's contract *in toto*, was stuck with retention of the benefits it had nego-

[37] *Pittsburgh-DesMoines Steel Company*, 202 NLRB 880 (1973); *Vallejo, supra.*

[38] *McKinzie Enterprises, Inc. d/b/a Cherokee United Super and Westpark United Super*, 250 NLRB 29 (1980).

[39] It must be noted that the memorandum provides wage increases for printing employees in all 3 years of the contract.

tiated separately. It is therefore more likely that the qualifying language was inserted to prevent the Union from taking a similar position in future negotiations with respect to the retention of this clause of tying wage increases to those negotiated with Respondent's competitors.

In addition to prior bargaining history, I also note that, during the instant negotiations, Mitchell proposed an increase of $11 per week for manufacturing employees in the first year of the contract, and that DeGennaro in attempting to convince Respondent to agree to same indicated that this wage increase for the manufacturing employees was a fair and reasonable request for that particular year. These comments suggest that additional wage increases for the second and third years would be included in the contract, and I am persuaded that that was Roy Arroll's belief when he signed the memorandum of agreement. Roy Arroll impressed me as an intelligent and able individual.[40] He was an experienced labor negotiator, having dealt with the Union for 20 years, personally negotiated three prior contracts, and possessed a masters degree in economics. It is inconceivable that Arroll, with this background and in view of the history of the parties bargaining,[41] could have believed that the Union could or would agree to a contract, wherein Respondent's 4 printing employees would receive increases totaling $60 per week over a 3-year period, while its 14 manufacturing employees would receive only an $11 increase in the first year of the contract, and no raises in subsequent years.

Unions in general and this Union in particular would not and do not normally agree to such contracts, and I find that Arroll, an experienced labor negotiator was fully aware of such realities of labor relations. It is of course true that unions, particularly in today's troubled economic times, do occasionally agree to forgo wage increases for particular years, and indeed will sometimes agree to wage cuts or other reductions in benefits. However, this is generally done only in situations where the companies are in dire financial straits, usually in order to avoid layoffs or shutdowns, and are agreed to by unions only after lengthy negotiations and requests by the companies involved for such reduction or wage freezes. There is no such evidence of any dire financial problems of Respondent existing or being brought up during negotiations. Respondent's main contention was simply that it was unfair that it was paying an annuity and higher benefits than its competitors and it wanted some relief from the Union. Mitchell responded by reminding Respondent that he had given them relief in 1976 by freezing the annuity, would try to get an annuity and higher fringe contributions from Respondent's competitors, and again brought up Respondent's failure to accept the entire manufacturer's contract in 1970. To suggest as Roy Arroll testified that he believed that the Union was voluntarily, without Arroll even requesting it, giving him relief by agreeing to no wage increases for the second and third years of the contract for over 75 percent of the unit employees is incomprehensible and I do not credit Arroll's testimony to this effect.[42]

I find that, when Roy Arroll signed the August memorandum, he as well as the Union was without question fully convinced that the agreement to extend the terms of the old contract would include the clause tying second and third year increases for manufacturing employees to the increases agreed to by Huxley, Brenner, and New York, as the parties had agreed to for the past three prior contracts. Therefore I conclude that there was a "meeting of the minds" on the subject.

Respondent also contends that no "meeting of the minds" occurred with respect to the annuity provisions of the contract. Respondent notes that the 1979 memorandum provides that the prior contract prevails except where modified, and that the memorandum does not provide for any increases in annuity payments. The 1976 contract provided for annuities for printing employees of $10 per week, plus a $2-per-week raise on April 1, 1978. Respondent argues therefore that since the parties agreed that the old contract should apply unless modified, that the $10 figure per week with $2 raise in the last year should be applied in the 1979 contract.

However, it must be noted that the 1973 and 1976 contracts, as well as the 1979 proposed contract, provided that cost-of-living (herein called COL) increases are to be paid by Respondent, at various times, and at the direction of the Union, into any of the Union's funds, including the annuity fund. The 1976 contract also provides a maximum amount payable of $3 per week per employee per year and $6 per week over the life of the contract based on this provision, and a $2 increase on April 1, 1978, in the annuity fund. The record also reveals that, by virtue of the application of the 1976 contract, the Union directed annuity increases to be paid, raising the annuity payments to $13, $16, and finally $18 per week per employee by the time the contract expired. Since there is an obvious ambiguity as to the meaning of the terms of the memorandum as it applies to the annuity provision, it once again becomes necessary to evaluate extrinsic evidence in order to determine the true intent of the parties when the August memorandum was executed.[43]

[40] See *Annshire Garment Company, Inc.*, 211 NLRB 595 (1974).

[41] I note that all past contracts negotiated by Arroll have included wage increases for his manufacturing and printing employees in each year of each contract.

[42] I also note in this connection, Mark Arroll's January letter to his brother, in which he mentions his (Mark's) various objections to the proposed contract. Mark points out that "if by way of example the Union through inadvertence or otherwise" failed to include a request for increases beyond $11 in the memorandum that should be enforced. Mark's use of the word inadvertence in describing the Union's actions is quite revealing, and further tends to show that Respondent was quite aware when signing the agreement that second and third year increases were contemplated, and that Respondent viewed the Union's failure to include such a provision in the memorandum as inadvertent and not as an agreement to forgo such increases.

[43] In Mark Arroll's January letter to his brother, Mark points to the addendum to the 1976 and the 1979 proposed agreement, which provides that the maximum contribution shall be $10 per week per employee for the annuity. He goes on to say that he interprets this to mean that the maximum contribution to the annuity should be and should have been $10 per week for all employees, and that Respondent was entitled to a credit if it had paid more in the interim. However, this position overlooks the obvious fact that the addendum by its terms is limited in its application to manufacturing employees, and the $10 maximum contribution is also restricted to such employees. I find no ambiguity in this area, and in

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Once again past bargaining history fully supports the position of the Union and the General Counsel that there was a meeting of the minds on this issue. In the 1973 contract, Respondent's annuity contribution for all unit employees was set at $4 per week per employee. In addition, the contract provides for COL increases to be paid, at the direction of the Union to any of the Union's funds. During the 1973–76 period, pursuant to the Union's directions, the payments to the annuity fund were raised to $10 per employee.

In 1976 the parties signed a memorandum of agreement providing for a $2 increase per employee effective April 1, 1978, and a $6 maximum increase to be paid to the annuity as a result of the COL option of the Union. The 1976 contract did not go back to the $4 figure in the 1973 contract as a starting point, but to the $10 figure Respondent was paying at the time the old contract expired. Thus the 1976 contract provided for an annuity payment of $10 per week, the $2 raise in April 1978, and the maximum of $6 additional to the annuity fund based on the COL clause if the Union so directs. The contract in the addendum provided for freeze of $10 per week to the annuity for manufacturing employees. Therefore, bargaining history demonstrates that raises in the annuity have been granted from the amounts paid by Respondent at the end of the contract, rather than the amounts set forth in the prior contract.

The 1979 memorandum did not mention raises in the annuity, except for providing that all moneys due under the COL clause would be paid to the annuity fund. During the course of the negotiations in 1979, Respondent asked for some relief from the Union with respect to the annuity and or other fringe benefits with respect to its manufacturing employees. Arroll constantly stressed the fact that his manufacturing competitors had no annuity and were paying lower fringes and requested some relief from the Union. Mitchell replied that he had granted relief in 1976 by freezing the annuity at $10 for manufacturing employees, and indicated he would try to obtain an annuity from Respondent's competitors in the upcoming negotiations, and again reminded Arroll of his choice in 1970 to refuse to accept the manufacturer's contract as offered by the Union. There was no mention of the annuity for printing employees, and in fact after the Union presented the Atomic memorandum in July, setting forth the Union's proposals for printing employees, there was no discussion concerning matters relating only to printing employees.[44] Since the manufacturing employees constituted the large majority of the unit, it is logical that the negotiations would center around discussions concerning their conditions of employment. Thus, I find nothing in the 1979 negotiations to have suggested to Respondent that the Union was agreeing to reduce the annuity payments for printing employees from $18 to $10 as Respondent suggests should be the meaning of the memorandum. Indeed to the contrary, Mitchell again reiterated the Union's position frequently asserted in the past, that he could not and would not agree to reduce benefits previously granted to the employees.

Once again I rely as in the case of the second and third year wage increases, upon Arroll's experience as a labor negotiator, in general and with this Union in particular, in making my conclusion that he knew full well that by signing the memorandum in August he was agreeing to pay $18 per week to start for the annuity for manufacturing employees.

In fact, the record testimony of Roy Arroll and statements on the record by Mark Arroll further substantiate this conclusion. Thus, Roy Arroll on direct examination indicated that, when he went through the Union's proposed contract, he noticed that "they had differences in the annuity which we didn't even agree to and then we couldn't understand these differences how they even arrived at them." However, on cross-examination Arroll admitted that he was fully familiar with how the Union arrived at its annuity figures. Thus, he admitted as confirmed by Mitchell that, during the course of the 1976–79 contract, the annuity for printing employees was raised to $13 and then to $16 pursuant to the Union's direction under the COL clause, and to $18 pursuant to the April 1, 1978, raise provided in the contract. When asked further, Roy Arroll indicated that in his view the maximum under the old contract would be $18 and what he did not understand was the Union's request to raise the annuity to $21. Mark Arroll then asserted Respondent's position on the record to be that the old agreement provided for increases of $10 which were raised to $18, and that Respondent understood the memorandum to mean $18 per week. Moreover, Respondent continued to pay $18 per week to the annuity fund for printing employees, as late as March 24, 1980, covering the month of November 1979. Thus, to suggest that Respondent believed that the memorandum of agreement meant that annuity payments were to be reduced to $10 per week is incredulous.

I find accordingly that, when the parties executed the memorandum of agreement in August 1979, Roy Arroll as well as Mitchell were in agreement that annuity payments for printing employees would start at $18 per week per employee, as Respondent had been paying when the contract expired, and that pursuant to past practice and the terms of the last two agreements signed by the parties COL increases of up to $3 per year and $6 per contract would be applied to the payment to the annuity fund. I note additionally that the 1979 memorandum of agreement specifically states that all moneys due under the COL clause shall be applied to payments to the annuity fund. The fact that the Union chose to request a raise in the annuity payments pursuant to the COL provision, in the interim between the time the memorandum was executed and the proposed contract was submitted to Respondent, is of no consequence. The parties were treating the memorandum of agreement as an interim agreement, and Respondent had paid the wage increases provided therein retroactive to April 1979. Thus, the Union was clearly within its contractual rights to take advantage of the provision calling for an

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fact Respondent appears to have abandoned this position at the hearing and in its brief, and simply urges that the old contract's terms of $10 per week plus a $2 raise after 2 years be applied to the printing employees.

[44] Of course the discussions relating to changing the American Arbitration to the New York State Board of Mediation as the source of arbitrators applied to both printing and manufacturing employees, as did Respondent's request to no longer pay welfare benefits to discharged employees for 60 days, which also came up during the negotiations.

increase to the annuity in 1979 as a result of the COL having risen. I find that, contrary to the contrived testimony of Roy Arroll, he was well aware that when he signed the memorandum that the annuity payments to printing employees would provide for $18 per week, subject to a maximum of $6 increases under the COL clauses, and that he knew that the Union's request in 1979 to raise the annuity to $21 and in 1980 to raise it to $24 was in accordance with what he voluntarily agreed to when he executed said memorandum on August 6, 1979. Thus, there was a meeting of the minds on this issue.

Respondent also contends that there was no agreement reached on the issue of resolving disputes, or in the alternative if there was agreement reached, it was for nonbinding mediation. As noted above, I have credited the Union's witnesses over the contrary testimony of the Arroll brothers, and have found that during the 1979 negotiations the parties orally agreed to replace the American Arbitration Association with the New York State Board of Mediation, and not to replace the process of arbitration with mediation. Contrary to Respondent, I find no ambiguity in the documents signed on this issue. The memorandum provides, "*Settlement of Disputes, Differences and Grievances.* The American Arbitration Association shall be replaced by the New York State Board of Mediation." Since the expired contract provides a paragraph entitled "*Settlement of Disputes, Differences and Grievances,*" which recites an involved grievance procedure, culminating in arbitration, I find the only reasonable and logical interpretation of the memorandum to be an agreement to substitute the New York State Board of Mediation for the American Arbitration Association, and that the remainder of the provisions dealing with the grievance procedure be unchanged. This conclusion is fortified by the fact that the parties in their 1970 contract had substituted the New York State Board of Mediation for the American Arbitration Association, and in all other respects the clause was the same. In the 1973 contract the American Arbitration Association was substituted for the mediation board, with again the remainder of the clause not changed, and this clause was carried over in tact in the 1976 contract. Therefore, I find that Roy Arroll and Respondent knew what the New York State Board of Mediation was, knew that it supplied arbitrators for arbitration, and was fully aware when the memorandum was signed in August 1979, that the only change in the grievance procedure was to be a substitution of the State Board of Mediation for the American Arbitration Association as the source for arbitrators as the parties had agreed to in 1970.[45]

[45] I also note in this connection, as set forth above, that Mark Arroll's letter to Roy in January setting forth his objections to the proposed agreement did not mention this issue as having been a problem, although he detailed therein, numerous insignificant areas such as admitted typographical errors by the Union. This suggests as I have observed that the arbitration-mediation issue was a mere afterthought conjured up by Respondent to avoid signing the agreement. It is interesting to note that Respondent made no contention that arbitration had not been agreed to until after the Union filed for arbitration over the discharge of Dugan, after Respondent had already been enraged by the Union's filing for arbitration and requesting postdischarge welfare payments for employee Charles White.

The majority of the remaining objections to the proposed contract set forth by Mark Arroll in his January letter require scant comment. His comments about the vacation schedule, wage provision pages 7–8, and vacation schedule again (items 1, 2, and 6 in the letter) have no merit, as it is clear that the contract and the memorandum when read together create no confusion in these areas.

As to item 4 in Arroll's letter, the general help category provision, it is clear that the August memorandum referred to this category and provided that Respondent will pay the lowest wage negotiated by Melo, Atomic, and Westshore. Arroll's letter does not dispute that this was agreed to, but merely suggests that Respondent see their signed contracts before agreeing to this or negotiate its own salary. An examination of the contracts of Atomic, Westshore, and Melo reveal that Respondent's contract calls for the identical rates for this category as provided for by all of these companies.[46]

Objection 6(a) in the letter admittedly refers to typographical errors which had no effect on Respondent's failure to sign the agreement.

As to Objection 8, regarding David Smith, it is not clear what Respondent or Mark Arroll is claiming. There is no question, as admitted by Roy Arroll on the record that the parties considered the 1977 letters signed by each party relating to David Smith and the functions of any successor to Smith to be part of the 1976 contract. The 1979 proposed contract merely incorporated the substance of these letters into the body of the new contract.

Items 6(c) (the reference to the geographic successors clause), 9 (the reference to the trustees rules and regulations), 10 (payment of welfare benefits for 60 days after termination), 11 (rewording of par. 13 so that only the Union can make a claim), and 12 (cost of living) of Arroll's letter are not matters where he is asserting that the Union's proposed contract contradicts the memorandum executed. They are obviously no more than suggestions to his brother to attempt to renegotiate the agreement signed in these areas. In fact some of these suggestions, such as the deletion of the requirement for paying welfare benefits for 60 days after termination, and elimination of the requirement of paying according to the rules of the Union's funds, were brought up by Respondent during negotiations, but were rejected by the Union. Arroll signed the memorandum of agreement without the inclusion of these proposals to change the expired agreement. Therefore it was reasonable to construe Respondent's acceptance as agreement to renewal of the old agreement, with the changes specified therein, and without Respondent's proposals being included.[47]

It is again interesting to note Arroll's reference in his letter to paragraph 13 and his proposal that only the Union can make a claim for a worker and not the worker himself and his reference to the Charles White situation. This comment addresses itself to the grievance

[46] The rates were $205 per week the first year, $225 the second, and $245 the third.

[47] *Oxmoor Press, a Subsidiary of the Progressive Farmer Company*, 207 NLRB 419 (1973).

arbitration clause, and as noted above makes no contention that arbitration had not been agreed to. It does suggest a new proposal by Respondent that only the Union can bring a claim for arbitration.[48] This lends credence to the contention urged by the Charging Party that Respondent's actions in denying the existence of a contract may have been motivated, or at least accelerated by the Union's decision to seek arbitration of Dugan's discharge in February 1980.

Arroll in his letter in Objections 3 and 5 refers to the inclusion of a new category of platemaker-stripper in the agreement with wages of $245.50 to $285.50 plus a $5-per-day differential for employees performing camera work. Neither of these provisions was included in the parties' 1976 contract nor the 1979 memorandum.

However, the record demonstrates that in a phone conversation with Roy Arroll, shortly after Respondent commenced its lawsuit, Mitchell informed Arroll that he only included these clauses because of a prior gentlemen's agreement to include whatever other printers receive, but that, if he (Arroll) desired, the Union would agree to delete both of these clauses. Arroll did not respond to this offer. Mitchell also informed Arroll that the Union had in its proposed contract neglected to include a hiring provision which was agreed to in the August memorandum and stated that this would be confirmed by letter, which was in fact sent in July 1980.[49]

I find that the parties reached a meeting of the minds on terms of a new collective-bargaining agreement when the August 6 memorandum was executed. I further find that the Union's proposed contract mailed to Respondent in December correctly reflected this agreement, with the exception of the inclusion of the above-cited camera-platemaker clauses which were not agreed to, and the exclusion of the hiring clause which was agreed to by the parties.

Based on the circumstances described above, I find Respondent was not justified in refusing to execute the agreement it reached with the Union by its signing a memorandum of agreement on August 6.

Part of the obligation required by Section 8(d) of the Act to execute a contract agreed upon by the parties is the duty to assist in reducing the agreement to writing. *Kennebec Beverage Co., Inc.*, 248 NLRB 1298 (1980). Respondent took no action to attempt to comply with its duty to so assist, and in fact when the Union offered to delete the only clauses in its proposed contract not agreed to by the parties, and to include an item inadvertently left out, Arroll did not accept the Union's offer, and persisted in its refusal to sign the contract. Respondent has continued its refusal to sign the agreement, making numerous objections to the agreement, which I have found to be spurious and without merit. Therefore I conclude that, in these circumstances, these errors in the Union's proposed contract do not serve to relieve Respondent of its obligation to execute the contract based on the terms to which the parties have agreed.[50]

Accordingly, I am persuaded that Respondent after having agreed upon the terms of a new contract, by agreeing to extend the prior agreement plus the changes set forth in the memorandum of agreement, for reasons best known to itself, decided to renege on said agreement, and to refuse to sign the formal agreement setting forth the terms agreed upon.

A number of reasons are suggested by the record that might explain Respondent's change of position. One possibility is the influence of Mark Arroll. The record establishes that Mark Arroll was present at the August 1 negotiation session and did much of the talking and negotiation on behalf of Respondent on that date. Yet, his brother Roy met on August 6 with the Union without informing his brother, and signed a memorandum of agreement without consultation with him. This action clearly annoyed Mark, who admitted that he was suprised at Roy's signing the agreement, and on cross-examination of Mitchell sought to establish that somehow Mitchell should not have met with Roy Arroll without Mark being present. Further, Respondent's court papers urged as one ground for finding that no agreement was reached was the fact that Mark, Respondent's lawyer, was not present at the meeting wherein the memorandum was signed. In addition Mark's January letter to Roy strongly recommends not signing the agreement, and urges renegotiation of many matters over which there is no question had been agreed to by the parties.

Another possibility, as urged by the Charging Party, is the Union's decision to seek arbitration of Dugan's discharge. As noted, Respondent during negotiations had expressed annoyance with the Union for arbitrating the discharge of White and seeking welfare payments for him for 60 days after discharge, pursuant to the contract. Although Mark Arroll's letter to Roy in January shows that Respondent had problems with the agreement prior to Dugan's discharge, it is noted that Respondent failed to notify the Union of its position that no contract was in existence until after the arbitration request was filed in February 1980.

There are many other possible reasons for Respondent to have reneged on its agreement, including the simplest reason of all, that after considering more fully its action in signing the memorandum of agreement it concluded that it did not like the deal it had made, and preferred to negotiate a new one.

It can only be conjectured, which I have done, as to Respondent's reasons for later reneging on what it had already agreed upon. I need not and do not make any findings as to what these reasons were. I need only find, which I do, that this is what did occur.[51]

Accordingly, I find and conclude that Respondent by refusing to execute the collective-bargaining agreement,

[48] It is noted that during the negotiations, when Respondent complained about the Union's having taken White's case to arbitration, Mitchell defended his action in part by stating that the Union had no choice, since White could file a charge against the Union for failure to represent him.

[49] Note that Respondent apparently never noticed that this clause was not included in the contract, and has never asserted that its refusal to execute the contract was based in any part on this omission.

[50] *Kennebec, supra; Reppel Steel and Supply Co., Inc.*, 239 NLRB 358 (1978); *Trojan Steel Corporation*, 222 NLRB 478 (1976); *James F. Stanford, Inc. d/b/a Ace Machine Co.*, 249 NLRB 623 (1980); *Raven Industries, Inc.*, 209 NLRB 335 (1974).

[51] *The Walls and Ceiling Contractors Association, etc.*, 233 NLRB 954, 959 (1977).

the terms of which it had previously agreed upon, has violated Section 8(a)(1) and (5) of the Act.[52]

C. *Respondent's Unilateral Changes*

As I have found above that Respondent has unlawfully refused to execute a contract previously agreed upon, it must be assumed for the purposes of assessing Respondent's alleged unilateral changes that the contract has continued in existence.

Accordingly, I find that Respondent by unilaterally ceasing to make payments into the Union's pension, welfare, and annuity funds; by failing to grant the manufacturing employees April 1, 1980, wage increases as provided for in the agreement; and by failing and refusing to arbitrate the discharge of Dugan, has violated Section 8(a)(1) and (5) of the Act.[53]

Furthermore, even if I were to have found that the parties had not reached agreement on the terms of a new contract, Respondent's actions in ceasing payments into the Union's funds and in refusing to arbitrate the discharge of Dugan would still be violative of the Act.

It is well settled that the health, welfare, pension, and annuity funds which are part of an expired contract constitute an aspect of employee's wages and a term and condition of employment which survives the contract.[54]

Subject to certain exceptions not relevant here, an employer such as Respondent herein violates Section 8(a)(5) of the Act by unilaterally altering payments into these funds. *Henry Cauthorne, supra.*

As to Respondent's failure to arbitrate the discharge of Dugan, the Board in *American Sink Top & Cabinet Co., Inc.*,[55] relying on the Supreme Court's *Nolde* decision,[56] found the failure to arbitrate a discharge violates the Act, even where the contract has expired, if the dispute is over an obligation arguably created by the expired agreement.

The Board relied on the Supreme Court's language in *Nolde* that in the "absence of some contrary indication, there are strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract." *Id.* at 255.

The facts in *American Sink* are similar to the instant case. The contract expired and both the discharge and arbitration request occurred subsequent thereto and the employer took the position that, since there is no contract, it would not utilize the grievance procedure.

The Board found that there was no reason to conclude that the parties intended the arbitration provisions to end with the contract's term and ordered respondent to arbitrate the discharge.

In the instant case, the grievance arbitration clause in the parties' expired contract specifically provides that "a violation of this contract or of any previous contract shall survive the expiration of such contracts," and reinforces the presumption found by the Board in *American Sink* and the Supreme Court in *Nolde* that the parties intended the arbitration and grievance provisions herein to survive the expiration of the contract.

Thus, even absent an agreement on the terms of a new contract, I find that Respondent violated Section 8(a)(1) and (5) of the Act by ceasing payments into the Union's funds and by failing and refusing to arbitrate the discharge of Dugan.[57]

CONCLUSIONS OF LAW

1. Diplomat Envelope Corporation is an employer engaged in commerce within the meaning of the Act.

2. Printing Specialties & Paper Products Union No. 447, International Printing and Graphic Communications Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the Union has been and still is the exclusive collective-bargaining representative of Respondent's employees in the bargaining unit described below within the meaning of Section 9(a) of the Act. The appropriate bargaining unit is:

> All employees, including handlers, packers, order fillers, order pickers, stock men, shipping and receiving clerks, cutters, rotary cutters, slitters, sheeters, rewinders, sealers, wrappers, adjusters, operators, floor boys, pressmen, multility pressmen, ludlow tenders, and offset pressmen, of Respondent, employed at its Long Island City plant, exclusive of all other employees, including office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.[58]

4. By refusing to sign the collective-bargaining agreement prepared pursuant to the memorandum of agreement agreed upon between Respondent and the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. By unilaterally ceasing making payments on behalf of unit employees into the Union's pension, welfare, and annuity funds, by failing to grant a wage increase due under the collective-bargaining agreement to its employees, and by failing and refusing to arbitrate the discharge of its employee, Thomas Dugan, Respondent has en-

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[52] *Gollin Block and Supply Company*, 243 NLRB 350 (1979); *K Mart Corporation (formerly S.S. Kresge Company)*, 238 NLRB 1173 (1971); *Walls & Ceiling; Annshire Garment; Oxmoor, supra.*

[53] *Henry Cauthorne, an Individual, t/a Cauthorne Trucking*, 256 NLRB 721 (1981); *Paramount Potato Chip Company, Inc.*, 252 NLRB 794 (1980); *Victor Micelli and Sam Micelli d/b/a Riverside Produce Company*, 242 NLRB 615 (1979).

[54] *Henry Cauthorne, supra; Peerless Roofing Co. Ltd.* v. *N.L.R.B.*, 641 F.2d 734 (9th Cir. 1981).

[55] 242 NLRB 408 (1979).

[56] *Nolde Brothers* v. *Local 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243 (1977).

[57] In connection with this issue, Respondent contends that, since Dugan's claim for unemployment insurance has been denied by the New York State Department of Labor after a hearing and on appeal, the Board should be bound by this determination. This argument is clearly without merit. *Justak Brothers and Company, Inc.*, 253 NLRB 1054 (1981). Of course Respondent would be free at any arbitration hearing that might be held to introduce the decision of the State Department of Labor for whatever consideration or weight that the arbitrator might choose to accord it.

[58] The above-described unit is consistent with that recognized by the parties in their prior collective-bargaining agreements, and is therefore an appropriate unit. *Henry Cauthorne, supra.*

gaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent violated its obligation under the Act by refusing to sign a contract embodying the terms of the agreement reached between Respondent and the Union, I shall also recommend that Respondent be ordered upon request to sign such an agreement, to comply retroactively to its effective date with its terms, and to make whole the employees for loses, if any, which they may have suffered by Respondent's refusal to sign such an agreement in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Company*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Since I have also found that Respondent unilaterally ceased making contributions to the Union's pension, welfare, and annuity funds, I shall recommend that it be ordered to pay all such contributions to such funds, as provided for in the collective-bargaining agreement, which have not been paid absent Respondent's unlawful discontinuance of such payments.

I shall also recommend that Respondent be ordered to compensate the funds for administration costs and other expenses incurred by the funds as a result of its acceptance of retroactive payments. *Turnbull Enterprises, Inc.*, 259 NLRB 934 (1982).

I shall recommend leaving the determination of these amounts to further compliance proceedings.[59]

I shall further recommend that Respondent be ordered to arbitrate the discharge of employee Thomas Dugan.

I deem it unnecessary to specifically order Respondent to institute the wage increases unlawfully unilaterally withheld from its manufacturing employees, as provided for in the contract. The portion of my recommended remedy set forth above, dealing with Respondent's obligation to give effect to said contract and to make whole employees for losses suffered as a result of Respondent's failure to honor such agreement, would encompass such an obligation by Respondent.

The Charging Party contends that Respondent has raised numerous frivolous defenses herein and requests that Respondent be ordered to pay litigation expenses, including attorney's fees, witness fees, union representatives' salaries for days spent at National Labor Relations Board hearings, transcript costs, and other reasonable costs and expenses incurred by the Charging Party. *Wellman Industries*, 248 NLRB 325 (1980), *Heck's Inc.*, 215 NLRB 765 (1974).

I do not view Respondent's defenses as patently frivolous, and find no basis for awarding litigation expenses herein. *Turnbull, supra.*

Upon the foregoing findings of fact, conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[60]

The Respondent, Diplomat Envelope Corporation, Long Island City, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to execute the collective-bargaining agreement agreed upon by Respondent and the Union.

(b) Unilaterally ceasing to make payments on behalf of unit employees into the Union's pension, welfare, and annuity funds; failing to grant wage increases due under the collective-bargaining agreement to its employees; and failing and refusing to arbitrate the discharge of its employee Thomas Dugan.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request by the Union, forthwith execute the contract upon which agreement was reached with the Union.

(b) Give retroactive effect to the terms and conditions of employment of said contract and make whole its employees for any losses they may have suffered by reason of Respondent's failure to sign the agreement.

(c) Pay all contributions to the Union's pension, welfare, and annuity funds as provided for in the collective-bargaining agreement which have not been paid and which would have been paid absent Respondent's unlawful discontinuance of such payments.

(d) Arbitrate the discharge of employee Thomas Dugan.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant or necessary to facilitate the determination of the amounts due to employees under the terms of this Order.

[59] Because the provisions of the employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a "make-whole" remedy. Therefore, I leave to further proceedings the question of how much interest Respondent must pay into the benefit funds in order to satisfy the "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Company*, 240 NLRB 1213, 1216 at fn. 7 (1979); *Turnbull, supra.*

[60] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

(f) Post at its Long Island City, New York, place of business copies of the attached notice marked "Appendix."[61] Copies of said notice on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be conspicuously posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply therewith.

[61] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."